

Consideration of preliminary adoption of a rule to provide for review of testing results and review of continuing education; Administrative Cause No. 11-189A

For a growing list of circumstances, the ability to practice a vocation or avocation is dependent upon successful completion of a test administered by the Department of Natural Resources. The DNR also sanctions continuing education programs that must be attended to retain the ability to practice some vocations or avocations. These requirements may be authorized by statute or by rule.

Illustrative are the following:

- (1) To provide nuisance wild animal control services, an individual must obtain a permit and satisfy testing requirements under 312 IAC 9-10-11. The Division of Fish and Wildlife provides a written test “based on literature (reference material) that has been published on the subject, along with the applicable rule.” The division creates study packets and provides applicants with copies of the rules and packets, but not the test questions. To help evaluate the initial test, the division obtained feedback from experienced wild animal control operators, as well as from the division’s furbearer biologist and a conservation officer. A similar review is performed when the test is revised approximately every other year. As provided in the rule, a person has two opportunities to pass the test. Following a second failure, the person cannot again take the test for at least six months. If a person fails the test a second time by only one question, the division traditionally reviews the test to determine if a question is ambiguous. This license also has continuing education requirements
- (2) To provide wild animal rehabilitation, a person must obtain a permit and satisfy testing requirements under 312 IAC 9-10-9. The Division of Fish and Wildlife follows processes that are similar to those for a permit to provide nuisance wild animal control services, including continuing education requirements.
- (3) An individual must obtain a license under 312 IAC 9-10-13.1 to practice falconry and is required to satisfy testing requirements if not previously qualified as a general or master class license holder. The Division of Fish and Wildlife developed the test in cooperation with the Indiana Falconry Association. The U.S. Fish and Wildlife Service also reviewed and approved the examination. Continuing education requirements do not apply.¹
- (4) During the November 2011 meeting, the Natural Resources Commission gave final adoption to amendments to 312 IAC 11-13 to require both testing and continuing education for water well drilling contractors and for water well pump installers. 312 IAC 11-13 is administered by the Division of Water.

In September 2010, the Commission gave preliminary adoption to rules that would establish testing and continuing education requirements for water well drilling contractors and water well pump installers. The IDEM Commissioner’s designee, Martha Mettler Clark, asked whether the agency previously coordinated a continuing education program. She added, “One thing that we

¹ Linnea Petercheff, DNR Division of Fish and Wildlife (November 21, 2011 email).

have encountered with ours is that if you were to reject those credits that people like to have an opportunity to appeal the denial.”² During the November 2011 meeting, the Commission referred this subject to the Advisory Council for perspectives and advice.

The Indiana Professional Licensing Agency is responsible for testing and continuing education for several professions. The PLA provided a review structure used by California as a possible model. As provided in Title 16, Division 9 of the California CFR:

934. Examination Appeal

- (a) An applicant who has received a fail score on the written or practical examination shall be eligible to appeal to the board for a review of his or her examination results.
- (b) The appeal shall be filed with the board within fifteen (15) days after the date of notification of his or her examination results. The appeal shall be made in writing, and it shall state the reason for appeal. The board shall only consider appeals regarding significant procedural error in or adverse environmental conditions during the test administration.
- (c) The review of the appeal shall be conducted by one or more board members, or the board’s designee, to determine if there is clear and convincing evidence to sustain the applicant’s appeal. Such findings shall be subject to the approval of the board.
- (d) Within thirty (30) days after the board has approved the determination on appeal, the applicant shall be notified in writing of the results of his or her appeal. In acting on appeals, the board may take such action as it deems appropriate, including the issuance of a license where the board has determined that the applicant has demonstrated the required competence.³

During its December 2011 meeting, the Advisory Council was requested to recommend language for preliminary adoption or to establish a process for crafting appropriate language. The California regulation was cited, and as a starting point for evaluation, a draft rule was provided to the Council. The Advisory Council was informed that, as an alternative to rule adoption, a nonrule policy document might be the considered.

The draft minutes of the December 2011 meeting memorialize the Advisory Council discussion:

Stephen Lucas, Director of the Natural Resources Commission’s Division of Hearings, introduced this item. This agenda item is “a new one not just for the Advisory Council but for the Commission. It is how to manage processes where, by law, a person has to have a certification to engage in a vocation or avocation, and that authority is placed with

² Martha Mettler Clark, IDEM Deputy Assistant Commissioner, from Minutes of Natural Resources Commission (September 21, 2001).

³ Chris Smith, DNR Legislative Liaison (November 18, 2011 email).

the Department of Natural Resources.” Lucas provided examples of Department licensing or certification programs. He said the Division of Water administers the water well drilling contractor and pump installers program. Water well drillers and pump installers must pass a test and participate in continuing education. The Division of Fish and Wildlife administers licensing for falconers. Falconers must pass a test, but there is no continuing education requirement. The Division of Reclamation administers blaster certification, which requires continuing education for a licensed blaster. Lucas said he was not familiar with the nuances of each licensing program, but the impetus for the draft rule language was brought to the fore in a Commission meeting with respect to new rules being adopted by the Commission regarding water well drilling contractors and pump installers. He said the Commission’s IDEM representative reported that IDEM was finding that it is necessary to have an understanding of how the DNR was going to deal with testing. If somebody fails the test that means they can’t be a water well driller contractor. That person might feel like a question on the test was not appropriate, was unfair, or ambiguous, or their answer was just as good as, or better than, the one that would have caused the person to pass the test.

Lucas said particularly as continuing education becomes more serious—“sometimes in the first stages of a profession continuing education isn’t taken as seriously as it comes to be taken as time passes”—entities in the business begin to become proficient at developing better continuing education. Entities want to be able to provide education which qualifies for as continuing education credit. Lucas said a person in a profession that has specialized areas may want to take a continuing education class that addresses a particular interest to that profession. For example, in the context of water well drilling contractors there may be some who just drill wells for testing pollutants. “There may not be an adequate course in Indiana, but there is a great class offered in Georgia. An individual may not want to pay the cost of the class and travel expenses if the Georgia class would not qualify for continuing education credit in Indiana. You might have a situation where it’s the professional who wants to have the flexibility to have assurances before taking the class. That’s kind of the umbrella of the issues.... I threw out a draft rule for the packet not because I’m sold on the draft, but to use as a tool to help focus the conversation.” Lucas thanked Department professionals who provided input. “We wouldn’t rush forward today, and they may like to have the opportunity to weigh in.”

The Chair asked, “Is this establishing standards that haven’t existed in the past?”

Lucas responded that if an issue arose through a complaint, “I think we would have to address it as an adjudicatory matter without any guidelines for review.”

John Davis, “When you talk about a challenge, you are talking about somebody failed the test?”

Lucas responded that would be the most likely example.

Davis noted some license programs have continuing education and testing and other license programs do not. He asked, “So you have all those components and each legislative action either required one or both, testing and continuing education?”

Lucas said, as an example, there is a professional licensing for timber buyers. Currently, for timber buyer licensure there is no testing or continuing education requirement. This

initiative would not apply to timber buyer licensure. “However, if there is a testing requirement or continuing education, or both, then you have a potential for adjudication”.

The Chair asked, “Who sets the requirements and standards professional licensing?”

Lucas explained that testing and continuing education requirements may have originated in statute or rule. “It would have to come from a law administered by the DNR” for the proposal to apply.

Linnea Petercheff reported the Commission adopted rules in 312 IAC 9, the fish and wildlife administrative rule, which provides testing requirements and continuing education requirements.

The Chair asked for clarification regarding the purpose of the proposed rule amendments.

Lucas explained that the draft rule proposal before the Advisory Council would create a process or “sideboards by which you would look to when someone is saying ‘I think I developed or attended a class that should qualify for continuing education credit, but you didn’t give it to me,’ or perhaps more commonly, ‘I think I should have passed this test, but you gave me a failing mark and that wasn’t fair.’”

Jim Trachtman asked, “So there’s no appeal process whatsoever now?” Lucas responded there was no document to identify the parameters of a process.

The Chair said, “So this sort of outlines what the appeal process is in giving them some guidelines.... It’s not standardizing testing or continuing education?”

Lucas said the Chair was correct. The proposed rule “does not address substance and is strictly procedural.” Proposed 312 IAC 2-5-2 would clarify that when a license applicant is notified of receiving a “fail score”, the applicant may meet with the DNR division administering a test to discuss a particular question thought by the applicant to have been erroneously evaluated. “We would hope most matters would be resolved by consensus, and they wouldn’t go any further.”

Monique Riggs, Environmental Scientist with the Division of Water, said she assists with the water well drillers and pump installers license program. “It’s the best way to begin is to process for informal review, because I think being the administrators of the rules that they have to follow and the entity that approves their education, we would be able to work something out before it ever” reached an adjudicatory proceeding.

The Chair asked, “Do they apply to you or submit their continuing education or testing to you?”

Riggs responded sponsoring organizations that provide continuing education courses, in the case of the water well drillers and pump installers, apply to the Division of Water for the approval. “But that’s not to say that...if someone were to go out of state that applied to something specific that they might want to take it would be more efficient to have a procedure in place” for persons to seek approval from the Division of Water for a qualifying continuing education course.

Donald Van Meter noted some of the Department's professional disciplines and others, such as CPAs, "it's the professional organization that they belong to that does the certification. I assume that water well driller program is not one of those?"

Riggs responded the National Groundwater Association, Indiana Groundwater Association, and Indiana Rural Water Association, for examples, have been very actively involved in providing continuing education for drillers and pump installers. She noted that there are others that provide continuing education, such as pump manufacturers and material manufacturers. But the final decision regarding satisfactory testing and regarding qualification of a program for continuing education credit rests with the DNR's Division of Water.

Van Meter then asked, "The State requires the water well driller to do what? I haven't seen the job description."

Riggs explained that water well drillers and pump installers are requirement to fulfill a minimum requirement, every two years, of six hours of continuing education.

Van Meter clarified his question. "I'm thinking about the licensing not the continuing education."

Riggs said the Division of Water formulates the test for water well drillers and pump installers.

Van Meter asked whether there was an entity outside the Division of Water that provides any kind of certification for water well drillers.

Riggs answered that the Division of Water alone provides certification for water well drillers.

Van Meter asked whether Indiana's water well drillers licensing program was typical of most States. Riggs said Indiana's program is similar to those States in the Midwest region. Illinois, Ohio, and Kentucky have licensing programs administered by their respective DNR or Office of Environmental Policy.

Van Meter said, "My concern when it comes to testing is that it is 'reliable' and 'valid', and there are certain things that you do with exams to make them reliable and valid. Those are terms that some measurement people use. Have we done that?"

Riggs responded the test was authored in partnership between the Division of Water and the Indiana Groundwater Association's Education Committee.

Van Meter than asked, "So did they do reliability tests on the test? Validity tests?"

Riggs said the Indiana Groundwater Association Board reviewed the test questions and approved them.

Van Meter said, "That's one way of validating. You probably need more than one way. How about reliable? If a person took the test today, and then they also took a similar test or the exact test in three months, is it likely that the scores would be about the same? I'm

not asking you to answer that question. But that's the 'reliability' element. Has there been any attempt to do that?"

Riggs said the Department's exam has not been tested for reliability.

Van Meter said that if exams are not tested for reliability and validity, "in court, the test and measurement people are going to be asking more specific questions than what I asked. If there's not the right answer to that, I think it makes the DNR very vulnerable."

Davis asked Van Meter whether he recommended, that in formulating any Department exam, is it necessary to include a process of testing approval.

Van Meter said, "You need to be able to say to the person who is taking the test, and ultimately to the courts, it would seem to me, that we didn't just throw these questions out here. Here's what we've done in order to make this test adequately reflect a person's ability in this area."

Davis suggested the draft rule should provide a guidance framework for the professional licensing administered by the Department.

Lucas said the proposal would not attempt to impose substantive standards. "It's to develop a process that we hope can be consistent within the agency and transparent."

Van Meter noted a person can be certified without taking a test. "I was a certified professional soil scientist with my professional organization. I never took a test, but each year I had to submit my list of activities, and it was reviewed by a committee to make sure that I was doing the kind of things that kept me up to date in my area. So, there are ways other than taking a test to validate and to determine whether a person has the abilities for that profession... If I was involved in something like that, I think I would try to find valid, legitimate ways of determining whether a person was ready to drill wells in ways other than taking a test."

Riggs added, "The purpose of the exam is to demonstrate individuals understand and know 312 IAC 13, which covers the construction of water wells. That's what we test on specifically, not how they do their job or how they approach it."

Van Meter said, "That really helps out a lot as far as the validity of the test doing what you want it to do. I think that's good."

Richard Cockrum said "I understand and am comfortable with continuing education, but I'm a little bit bothered by the testing point. The Legislature and the Commission obviously has a test for a reason. If somebody fails it, are we setting up a mechanism of appeal that becomes subjective?"

Lucas responded, "I'm not sure the scenario you are talking about now wouldn't be true today" in the absence of any rule or other procedural structure. But if an individual filed for administrative review today, the administrative law judges would not have any guidance. The hope is this rule or something similar "would provide an avenue for an applicant to confer with the administering division regarding a particular testing outcome. The division that administers a test may agree the applicant has a valid complaint

regarding a particular answer. “If that’s what the agency looks at, and that’s the conclusion that it comes to, why would the agency want to deprive that person from engaging in the profession?” If a grievance advanced as far as administrative review, the administrative law judge would have guidance as to what to consider and how. Lucas conceded there would probably be subjectivity to any process. “That’s probably why...you have a test that is reliable and valid, because you reduce the subjectivity.”

Cockrum asked whether an appeal would be appropriate if a person answered five out of seven questions correctly or four out of seven. “You can appeal failing the bar, but you have to be within a certain percentile to even appeal.”

Lucas said, “I see your point, but I don’t have a good answer. Maybe there is a good way to do that.”

Sandra Jensen said a standard that requires a person to achieve a minimum testing percentile to qualify for appeal “may have validity”.

The Chair asked whether there have been appeals from persons that have failed Department exams. Jensen added that she presided over an adjudication involving the soil scientist licensing program. This program is outside the DNR but within the responsibilities of the Commission’s Division of Hearings.

David Lupke noted that California’s licensing program “seems to avoid the whole issue of the validity of the test itself, because [California states] the board shall only consider appeals regarding significant procedural error or adverse environmental conditions during the test administration.” He said California seemingly would not consider the validity of the test itself, but would assume the test is valid.

Lucas said he agreed with Lupke’s assessment of the California model.

William Wert asked about an outcome that may result if the Department agrees with an applicant that there is a more appropriate answer to a test question. “If ‘b’ is a better answer than ‘c’, then do you have to go back to all the people that answered ‘c’ and retest them? What does that do to the validity of the test?”

Lucas answered, “I don’t have any answer to that. It’s a good question.”

Van Meter said, “If you do it to one, then you are going to be vulnerable if you don’t do it to all.”

The Chair asked, “I think what you are asking us today is for our approval of this concept to move forward, is that correct?”

Lucas agreed, but he also invited Advisory Council members to participate in crafting a workable document.

Van Meter said, “At Ball State University—let’s say someone is going up for tenure—we look at our guidelines if there is an appeal, and there are always appeals. We would say at the Dean’s level that the department determines whether or not this person has the content, has the ability to do what it is that we’re supposed to do. If that’s appealed, and

it goes to the college or university, the only thing we look at is the procedure.... Once you get away from the people who work with this person all the time—and know the subject matter and have their Ph. Ds in this area—we are not about to change that at a higher level. But we will look at whether or not they were given a fair treatment procedural wise. So that’s something that might need to be reviewed.” He also suggested that if there is a concern regarding the abilities of a certain individual, a panel of well drillers should be formed and “let the well drillers determine whether or not this person can drill wells.... I would trust them, because they drill wells.... Let the Department only be concerned about the procedural part.” The DNR would need to have the ability to empanel well driller experts to review an appeal. “I don’t think you want the Department to make judgments on whether or not a guy can drill a well.”

The Chair invited Advisory Council members to contact Steve Lucas if they had an interest to assist in the crafting a proposed rule.

In light of the Advisory Council discussion, potentially affected DNR Divisions were invited to participate in another meeting to consider possible amendments to the draft. The meeting occurred on March 29, 2012. Monique Riggs from the Division of Water and Linnea Petercheff from the Division of Fish and Wildlife attended, offered comments, and suggested amendments. Several amendments were made, and these are incorporated in the document attached as Exhibit “A”. The document is recommended for preliminary adoption.

Exhibit “A”

Rule 5. Review of Determinations for Testing and Programs for Continuing Education

312 IAC 2-5-1Applicability

Authority: IC 14-10-2-4; IC 25-39-4-9

Affected: IC 14; IC 25-39

Sec. 1. (a) This rule applies to a department determination that:

(1) a person has failed a test; or

(2) the sponsor of a continuing education program or license applicant has not satisfied minimum requirements for the department to sanction credit for the program;

if successful completion of the test or continuing education is required, by a statute or rule, for conduct of an activity licensed by the department.

(b) The requirements of this rule are in addition to any requirements for licensure or continuing education set forth by statute or another rule for a program that is governed by subsection (a). (*Natural Resources Commission; 312 IAC 2-5-1*)

312 IAC 2-5-2 Informal review of test failure by administering division

Authority: IC 14-10-2-4; IC 25-39-4-9

Affected: IC 14; IC 25-39

Sec. 2. (a) A license applicant that is notified of a fail score on a written or practical examination may seek informal review from the director of the division, or the division director's designate, of the examination results.

(b) An applicant must submit the request for informal review with the director of the division, or the division director's designate, within the earlier of:

(1) fifteen (15) days if notification of a fail score included the address of the person to whom the request must be directed and a statement the request must be made within fifteen (15) days of the notice; or

(2) ninety (90) days if the notification of a fail score did not include the information described in subdivision (1).

(c) The division shall conduct the review in an informal manner. If requested by the applicant, the division shall confer with the applicant at the division's office before deciding the informal review.

(d) The division director or the division director's designate may take any appropriate action, including retesting or the issuance of a license, if determining the fail score was the likely result of any of the following:

(1) A significant procedural error by the division.

(2) Adverse environmental conditions immediately preceding or during the test administration.

(3) Both of the following:

(1) The applicant was within ten percent (10%) of a passing score.

(2) A test question or questions is demonstrated to exhibit fundamental ambiguity that could be reasonably expected to cause an applicant to select an answer other than the answer identified by the division as correct. (*Natural Resources Commission; 312 IAC 2-5-2*)

312 IAC 2-5-3 Informal review of administering division's determination not to credit a continuing education program

Authority: IC 14-10-2-4; IC 25-39-4-9

Affected: IC 14; IC 25-39

Sec. 3. (a) The sponsor of a continuing education program or a license applicant who attends a continuing education program may seek informal review from the director of the division, or the division director's designate, of a decision by the division not to authorize credit or to authorize fewer credits than the sponsor or license applicant believes are appropriate.

(b) A sponsor or an applicant must submit the request for informal review with the division director or the division director's designate. To qualify for administrative review under section 4 of this rule, a request for informal review under this subsection must be made before the program is presented.

(c) The division shall conduct the review in an informal manner. If requested by the sponsor or applicant, the division shall confer with the sponsor or applicant at the division's office before deciding the informal review.

(d) The division director or the division director's designate may take any appropriate action, including approving credit or additional credits, if the division is provided with sufficient written documentation to determine a continuing education program:

(1) includes information significant to the governing statute or rule that was not previously known to the division; or

(2) provides innovative or specialized instruction to a limited constituency, with extraordinary educational needs, and that is likely to enhance the interests protected or promoted by the governing statute or rule. (*Natural Resources Commission; 312 IAC 2-5-3*)

312 IAC 2-5-4 Administrative review

Authority: IC 14-10-2-4; IC 25-39-4-9

Affected: IC 14; IC 25-39

Sec. 4. (a) A division director or the division director's delegate shall notify a person in writing who seeks review under section 2 or section 3 of this rule, within thirty (30) days after completion of the review, of the division's decision.

(b) The notification provided under subsection (a) shall advise the recipient of the opportunity to seek administrative review of the division's decision, under IC 4-21.5 and 312 IAC 3-1, within eighteen (18) days of issuance of the notice. (*Natural Resources Commission; 312 IAC 2-5-4*)